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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.

EXAMINER

ART UNIT	PAPER NUMBER

DATE MAILED:

Please find below and/or attached an Office communication concerning this application or proceeding.

Commissioner of Patents and Trademarks

Office Action Summary

Application No.	Applicant(s)
09/617,930	Schmoutz et al.
Examiner	**Art Unit**
Lien Tran	1761

-- *The MAILING DATE of this communication appears on the cover sheet with the correspondence address* --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1) [X] Responsive to communication(s) filed on *Aug 16, 2000* .

2a) [ ] This action is **FINAL.** 2b) [X] This action is non-final.

3) [ ] Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

Disposition of Claims

4) [X] Claim(s) *1-28* is/are pending in the application.

4a) Of the above, claim(s) *15-28* is/are withdrawn from consideration.

5) [ ] Claim(s) _____ is/are allowed.

6) [X] Claim(s) *1-14* is/are rejected.

7) [ ] Claim(s) _____ is/are objected to.

8) [ ] Claims _____ are subject to restriction and/or election requirement.

Application Papers

9) [ ] The specification is objected to by the Examiner.

10) [ ] The drawing(s) filed on _____ is/are objected to by the Examiner.

11) [ ] The proposed drawing correction filed on _____ is: a) [ ] approved b) [ ] disapproved.

12) [ ] The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. § 119

13) [X] Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).

a) [X] All b) [ ] Some* c) [ ] None of:

1. [X] Certified copies of the priority documents have been received.
2. [ ] Certified copies of the priority documents have been received in Application No. _____ .
3. [ ] Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

*See the attached detailed Office action for a list of the certified copies not received.

14) [ ] Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).

Attachment(s)

15) [X] Notice of References Cited (PTO-892)
16) [ ] Notice of Draftsperson's Patent Drawing Review (PTO-948)
17) [X] Information Disclosure Statement(s) (PTO-1449) Paper No(s). 2
18) [ ] Interview Summary (PTO-413) Paper No(s).
19) [ ] Notice of Informal Patent Application (PTO-152)
20) [ ] Other

1. Restriction to one of the following inventions is required under 35 U.S.C. 121:

I. Claims 1-14, drawn to a confectionery product, classified in class 426, subclass 89.

II. Claims 15-24, drawn to another confectionery product, classified in class 426, subclass 660.

III. Claims 25-28, drawn to a method for preparing a confectionery product, classified in class 426, subclass 99.

2. The inventions are distinct, each from the other because of the following reasons: Inventions I &II and III are related as process of making and product made. The inventions are distinct if either or both of the following can be shown: (1) that the process as claimed can be used to make other and materially different product or (2) that the product as claimed can be made by another and materially different process (MPEP § 806.05(f)). In the instant case, the product as claimed can be made by another and materially different process reducing the size of the vegetable solids and wrapping such solids in the fat.

Inventions I and II are independent and different inventions because the two products are different. One is a multilayer product containing different layers of materials and the other one is a single product containing the vegetable solids. The two products differs in structure and composition.

3. Because these inventions are distinct for the reasons given above and the search required for Group I is not required for Group II and III or vice versa, restriction for examination purposes as indicated is proper.

4. During a telephone conversation with Allan Fanucci on August 31, 2001 a provisional election was made with traverse to prosecute the invention of Group I, claims 1-14. Affirmation of this election must be made by applicant in replying to this Office action. Claims 15-28 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

5. Applicant is reminded that upon the cancellation of claims to a non-elected invention, the inventorship must be amended in compliance with 37 CFR 1.48(b) if one or more of the currently named inventors is no longer an inventor of at least one claim remaining in the application. Any amendment of inventorship must be accompanied by a petition under 37 CFR 1.48(b) and by the fee required under 37 CFR 1.17(I).

6. Receipt is acknowledged of papers submitted under 35 U.S.C. 119(a)-(d), which papers have been placed of record in the file.

7. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless --
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.
>
> (a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

8. Claims 1 and 4 are rejected under 35 U.S.C. 102(b) as being anticipated by Durst.

Durst disclose a food bar made of vegetable solids and a fat. The fat is included in the binder which contains sucrose. The binder is mixed with the solids to form a ready to eat food

bar. All the examples discloses the solids are present in an amount greater than 15%. The binder includes sucrose; thus, the product can be considered a sweet product. The reference meets all the limitations of the cited claim. (See col. 2 and the examples)

9. Claims 1 and 4-6 are rejected under 35 U.S.C. 102(a) as being anticipated by DE 2746479.

DE 2746479 discloses a shaped confectionery containing 5-75% shredded beet, bran or vegetable fibres. The shredded and dried beets may be used in form of finely divided powder or a coarse granule.

10. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

11. The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

12. Claims 2-3 and 7-14 are rejected under 35 U.S.C. 103(a) as being unpatentable over DE 2746479.

DE 2746479 does not disclose the size of the vegetable as claimed, the amount of fat and the inclusion of a cereal-based component.

It would have been obvious to include a cereal-based component such as oat, wheat, rice ect... to obtain a different texture, taste and flavor and to obtain the nutritious benefits provided by the grains.. It is notoriously well known in the art to include such inclusion in food bars. For example, there are many foods bar having rice crispies or oat flakes mixed in. It would also have been obvious to grind the vegetable solid to any particle size depending on the taste perception desired. For example, if a noticeable taste of the vegetable solid is desired, it would have been obvious to grind the solid to big particles or if a very little taste of the solid is desired, it would have been obvious to reduce the vegetable to very fine particles. It would also have been obvious to vary the amount of fat depending on the fat content and the taste desired. The fact that the product in the reference is a confectionery; it is obvious that it contains sugar. The amount and type of sugar used would have been an obvious variation depending on the degree of sweetness and taste desired.

13. Claims 1-14 are rejected under 35 U.S.C. 103(a) as being unpatentable over DE 4224356.

DE 4224356 discloses a food product in which hot or warm chocolate is used as binder and the food product contains vegetable, pulse, salad, etc.. The vegetable component can be pureed or powdered.

DE 4224356 does not disclose the size of the vegetable as claimed, the amount of fat, the amount of vegetable and the inclusion of a cereal-based component.

It would have been obvious to include a cereal-based component such as oat, wheat, rice ect... to obtain a different texture, taste and flavor and to obtain the nutritious benefits provided by the grains.. It is notoriously well known in the art to include such inclusion in food bars. For example, there are many foods bar having rice crispies or oat flakes mixed in. It would also have been obvious to grind the vegetable solid to any particle size depending on the taste perception desired. For example, if a noticeable taste of the vegetable solid is desired, it would have been obvious to grind the solid to big particles or if a very little taste of the solid is desired, it would have been obvious to reduce the vegetable to very fine particles. It would also have been obvious to vary the amount of fat depending on the fat content and the taste desired. As to the amount of vegetable, it would have been obvious to include any amount of vegetable depending on the taste, flavor desired. The binder is chocolate or sweet; thus, it is obvious that it contains sugar. The amount and type of sugar used would have been an obvious variation depending on the degree of sweetness and taste desired.

14. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

McHugh et al disclose restructured fruit and vegetable products.

Vajda et al disclose fruit-containing chocolate products.

Given, Jr. et al disclose fruit-containing confectionery bar.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lien Tran whose telephone number is (703) 308-1868. The examiner can

normally be reached on Wed-Fri. The fax phone number for the organization where this application or proceeding is assigned is (703) 305-7718.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0661.

September 5, 2001

LIEN TRAN
PRIMARY EXAMINER
Group 1700